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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEWIS SERVICE CENTER, INC.,

Petitioner,

v.

MACK TRUCKS, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MEMORANDUM FOR MACK TRUCKS, INC. IN OPPOSITION

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MEMORANDUM FOR MACK TRUCKS, INC. IN OPPOSITION

STATEMENT OF CASE

In this case, the United States Court of Appeals for the Eighth Circuit unanimously held that the Sherman Act was not violated by a nationwide and long-established "sales assistance" program by which Mack Trucks, Inc. ("Mack") adjusts its wholesale price for trucks to help its distributors meet retail price competition. *Lewis Service Center, Inc.* v. *Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983). Petitioner Lewis Service Center, Inc. ("Lewis"), a distributor of Mack trucks in Lincoln, Nebraska, asserted below that through sales assistance Mack vertically fixed Lewis' maximum resale price, and argues in its petition that the Eighth Circuit's refusal to condemn the sales assistance program as *per se* illegal conflicts with precedent.

Contrary to petitioner's argument, courts have uniformly upheld dealer assistance programs such as Mack's. For example, in *AAA Liquors, Inc.* v. *Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1903 (1983), the Tenth Circuit recently held that a very similar program did not violate the Sherman Act. Because the Eighth Circuit's decision correctly followed all reported precedent, that decision should not be reviewed by this Court, and Lewis' petition should be denied.

Lewis' petition is premised on a flat misstatement of the legal ruling in the Court of Appeals' opinion. Lewis claims that the Court of Appeals wrongly held that "resale price maintenance is permissible under the Sherman Act." Petition at 3. Instead, in reversing the district court's decision to let the jury verdict stand against Mack, the Court of Appeals concluded that there was insufficient evidence in the record to support any conclusion that Mack's program constituted resale price maintenance or any *per se* illegal practice, and that the program was uncontrovertibly procompetitive.

The Court of Appeals found that the undisputed evidence established that under the sales assistance program

> Mack reduces its standard wholesale price to dealers on a case-by-case basis when dealers cannot meet interbrand competition from other truck dealers. To participate in the sales assistance program, a dealer submits an application to Mack setting forth the resale price the dealer estimates it can obtain from a particular customer, and identifies the interbrand competition that necessitates offering a lower resale price for a Mack brand truck. If Mack decides to grant sales assistance, Mack agrees to reduce its wholesale price to the dealer by an amount that

> guarantees the dealer a specified minimum profit on the sale (generally four percent of the chassis list price).

714 F.2d at 843-44.

The Court of Appeals unanimously rejected petitioner's contention that Mack's program constituted a *per se* violation of the Sherman Act on the basis of three conclusions. First, contrary to petitioner's assertion, the Eighth Circuit did not decide "that Mack's action did not constitute resale price maintenance or price fixing because there was no evidence that Mack fixed an *explicit* price." Petition at 4. Instead, the Court of Appeals found that Mack's program did not explicitly fix prices, and that "Mack neither directly nor indirectly fixed the price at which Lewis ultimately sold its trucks." 714 F.2d at 845.[1]

Second, the Court of Appeals found that the legality of the sales assistance program should have been determined under the rule of reason because on the record (1) the program did not constitute price fixing and (2) the program did not have anticompetitive effects in the market.[2] 714 F.2d at 846-47.

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[1] Similarly, the Court of Appeals specifically rejected petitioner's purported "factual statement" that once Mack offers a wholesale price reduction to the dealer under the program, Mack "[requires] the dealer to sell to the named customer at the Mack-specified resale price." Petition at 6. The Eighth Circuit actually found that "[i]n evaluating Lewis' request for sales assistance and price estimates, Mack does not . . . require Lewis to adhere to Lewis' original estimate in making the final sale. Lewis may ultimately charge a lower or higher price than that represented in its request for sales assistance." 714 F.2d at 845.

[2] Throughout the trial and appeal, petitioner's only claim concerning the sales assistance program's allegedly injurious effect was that petitioner could have made a higher profit if Mack had simply re-

Third, the Court of Appeals found that when evaluated under the rule of reason, the sales assistance program must be upheld, because "[a]fter examining the entire record, we fail to see how Mack's program could be characterized as anything other than procompetitive." 714 F.2d at 848. The Court of Appeals found that the effect of the discount program was to "lower retail prices to customers and increase interbrand competition," and noted that Lewis offered no evidence to the contrary. *Id.*

In effect, petitioner asks this Court to overrule or disregard factual conclusions reached below, in order to resolve legal questions which simply were not addressed by the Court of Appeals. To the extent petitioner focuses on the opinion actually rendered by the Eighth Circuit, petitioner asks this Court to consider questions of law which have been uniformly resolved against petitioner by each of the many courts which have decided them. Accordingly, as set forth below, the writ of certiorari should not be granted in this case.

I

REASONS FOR DENYING THE WRIT

Petitioner argues for the grant of the writ of certiorari on two grounds. First, petitioner argues that the Court of Appeals erroneously departed from precedent concerning vertical price fixing allegations, by holding petitioner to a standard of proof higher than that imposed in analo-

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duced the wholesale price of its trucks to petitioner, without requiring the distributor to show that such reductions were necessary in order to help the distributor to meet competition. Petitioner never alleged that the sales assistance program injured competition itself in any way; its new claim that the program exerted anticompetitive effects is both too late, and unsupported by the record evidence.

gous cases. Second, petitioner also asserts that the Court of Appeals erroneously applied the rule of reason rather than the *per se* rule to Mack's conduct, and that the *per se* rule should have been applied because vertical price fixing was at issue. Because the Eighth Circuit decided that Lewis presented no evidence that the sales assistance program could be characterized as price fixing, however, neither of the Petitioner's arguments has merit, and the petition should be denied.

A. All Precedent Supports The Eighth Circuit's Decision That Sales Assistance Was Not Price Fixing Per Se

The Court of Appeals held that a program which does not direct the retailer to charge any specific price, but which merely enhances the distributor's retail pricing flexibility in order to help it to meet competition, cannot be characterized as price fixing under any Sherman Act precedent. As the Court found,

> Mack simply determines the maximum amount, based on the information supplied to Mack by the dealer, by which Mack is willing to reduce its wholesale price (and thereby its profit) in order to assist the dealer in selling a Mack truck. In granting such a discount, Mack may require the dealer to reduce its own profit as well. Mack has a right to ensure that the discount it affords its dealers is passed on to the customer. We cannot accept Lewis' argument that Mack must lower its wholesale price to a figure Lewis deems attractive without requiring a commensurate reduction on Lewis' part.

714 F.2d at 846. Every court which has considered the legality of similar limitations on wholesale price discounts has reached the same conclusion: they are not price fixing. *See, AAA Liquors, Inc.* v. *Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1903 (1983); *Butera* v. *Sun Oil*

Co., 496 F.2d 434 (1st Cir. 1974); *Sun Oil Co.* v. *Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); and *Mowrey* v. *Standard Oil Co.*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd mem.*, 590 F. 2d 335 (6th Cir. 1978).

Petitioner nevertheless asserts that in holding that the sales assistance program did not constitute price fixing, the Court of Appeals issued an opinion in conflict with the law established by this Court and other circuits. Petitioner argues that the Court of Appeals erroneously held that in order to prove resale price maintenance, a distributor must prove that the manufacturer explicitly and directly suggested adherence to an exact price, when the correct rule is that "demonstrating any effect on price" is sufficient. Petition at 11, 13. Petitioner also argues that the Court of Appeals erroneously held that vertical price fixing can only be found if the manufacturer threatened the distributor with termination, when other forms of coercive activity such as price surveillance will also support a judgment of price fixing. Petition at 11-12. These arguments must both be rejected, and the writ denied, because petitioner has misrepresented the holdings of the Court of Appeals, and the actual holdings of the Court are not in conflict with the cases cited by petitioner.

1. All Precedent Supports The Court's Holding That Because There Was No Suggested Retail Price To Be Maintained, No Vertical Price Fixing Could Be Found

The Court of Appeals held that Mack did not fix the prices of trucks sold by Lewis because the undisputed evidence showed that (1) Lewis itself selected an estimated price for the Mack trucks that it proposed to sell to its customers, (2) Mack never suggested any alternative price, and (3) Mack never required Lewis to adhere to the

price which Lewis had originally estimated. 714 F.2d at 845. Contrary to petitioner's assertion, the Court of Appeals did not hold that a showing of resale price maintenance requires evidence that the manufacturer "explicitly mentioned or established the exact retail price." Petition at 11.

Instead, the Court found that Mack neither suggested any retail prices to Lewis, nor conditioned the benefit of sales assistance to Lewis upon the price Lewis charged. 714 F.2d at 845-46. In fact, the Court of Appeals found that Mack's program *increased* the dealer's pricing flexibility in order to help it meet retail competition. *Id.* Further, the Court of Appeals in fact did inquire whether the program "indirectly" fixed the resale price, the inquiry petitioner claims is required. The Court expressly concluded that "Mack neither *directly nor indirectly* fixed the price at which Lewis ultimately sold its trucks." 714 F.2d at 845. (emphasis supplied.)

Petitioner nevertheless asserts that this holding of the Court of Appeals conflicts with three decisions: *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); and *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 933 (1964). The Court of Appeals' decision in no way conflicts with any of these cases.

In *Albrecht* v. *Herald Co.*, *supra*, this Court found price fixing where the defendant supplier announced an exact resale price to its dealers. Adherence to the announced price was enforced by vigorous efforts to drive non-complying dealers out of business. By petitioner's own admission, Mack engaged in no such activity in this case. The Court of Appeals' decision therefore does not conflict with *Albrecht*.

Cernuto, Inc. v. *United Cabinet Corp.*, *supra*, also concerned issues without relevance to the instant case. *Cernuto* states only that a conspiracy between a retail dealer and its manufacturer to terminate supplies to a price-cutting competitor of the conspiring dealer is *per se* illegal if done in order to support the conspiring dealer's retail prices by weakening horizontal competition. In the instant case, the Eighth Circuit considered a completely different practice, and found that it not only did not *reduce* horizontal competition, but promoted such competition. The Eighth Circuit's decision therefore raises no conflict with *Cernuto*.

In *Lessig* v. *Tidewater Oil Co.*, *supra*, the Ninth Circuit held that a supplier's dealer assistance program constituted price fixing where "[p]ayment of 'dealer-aid' was conditioned upon adherence by the dealer to resale prices stipulated by [the supplier]," and that adherence to these explicitly fixed prices was obtained by the defendant supplier's repeated threats to terminate the noncompliant dealer, among other practices. 327 F.2d at 463. The *Lessig* case is therefore based upon facts which were not even alleged in this case, and the Court of Appeals' refusal to apply *Lessig* here raises no conflict.

2. All Precedent Supports The Eighth Circuit's Holding That Because There Was No Evidence Of Coercion By Mack, There Can Be No Finding That Petitioner's Prices Were Fixed

The Court of Appeals also held that none of the practices employed by Mack coerced its dealer, Lewis, in any way. 714 F.2d at 845-46. The Court did not, as Lewis asserts, hold that only threats of termination were sufficient to establish impermissible coercion. Instead, the Court of Appeals found that once Mack had offered a sales assistance discount to Lewis, Mack actually extended the

discount to the distributor to the extent that competition required the distributor to reduce its own price, and that therefore no impermissible price-affecting leverage was exerted upon the dealer. 714 F.2d at 846. The Court of Appeals held that under such circumstances, no Sherman Act violation could be found. *Id.* The actual holding of the Court of Appeals is therefore in harmony, and not in conflict, with each of the cases cited by petitioner.

Each of the cases relied upon by petitioner predicated its holding of resale price maintenance on the existence of coercive action which was not even alleged in this case. In *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 45-46 (1960), this Court found that the defendant may have coerced adherence to a resale price maintenance scheme by threats of terminating retailers. No evidence of such coercion was presented in this case. 714 F.2d at 845-846. Similarly, in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, ___ U.S. ___, 103 S. Ct. 1249 (1983), the court found that coercion was established by the manufacturer's actual termination of its plaintiff distributor in response to price complaints received from the distributor's competitors. 684 F.2d at 1238-39. No similar allegations were made by Lewis. Accordingly, *Spray-Rite* cannot lend support to petitioner's allegation that impermissibly coercive behavior was present in this case.[3]

Each of the other cases relied upon by petitioner also involved practices which were not even alleged in this

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[3] Although this Court has granted certiorari in *Spray-Rite*, that case raises different issues than this case does. *Spray-Rite* concerns whether the *per se* rule can properly be applied to certain non-price vertical restrictions which are found as a matter of fact to constitute part of a price fixing conspiracy, and whether termination of a dealership under certain circumstances can support an inference of

case. *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980) (threat of termination); *Reed Bros., Inc.* v. *Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976) (threat of termination to enforce territorial restrictions); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (withdrawal of all price supports by supplier in retaliation for retailer's reduction of retail price below that suggested by the supplier).

The Eighth Circuit's holding that Mack's sales assistance program does not constitute price fixing does not merit review by this Court. As described above, the case was correctly decided on its facts in accordance with all precedent, and raises no novel issue of federal importance. Lewis' petition should therefore be denied.

B. The Eighth Circuit's Decision That The Sales Assistance Program Must Be Judged Under The Rule Of Reason Is Consistent With All Precedent

Petitioner argues that the Court of Appeals' decision to apply the rule of reason to respondent's conduct is in conflict with *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982). Petitioner contends that *Maricopa* requires that in cases where *per se* violations of the Sherman Act are proved, no "rule of reason" analysis of the effect of the practices upon competition can legitimately be undertaken. Petitioner also argues that the Court of Appeals' reversal of the district court's judgment was improper, because even if the rule of reason should properly have been applied, the case should have

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coerced concerted action. Brief of petitioner Monsanto Co., at i. The facts of this case, as found below, make these questions irrelevant to this case since the Court found that Mack's practices did not constitute price fixing. There is therefore no need to defer denial of Lewis' petition pending ultimate resolution of *Spray-Rite*.

been remanded to the trial court for further proceedings concerning the effect of Mack's sales assistance program on competition. Neither of these arguments has merit.

1. All Precedent Supports The Eighth Circuit's Decision That The Rule Of Reason Should Be Applied

The Court of Appeals applied the rule of reason in this case because it found that (1) respondent's practices did not constitute coercive price fixing and (2) judicial experience did not warrant condemnation of the challenged conduct as anticompetitive without a determination of the conduct's effect on competition in the market. 714 F.2d at 846-47. Following this Court's precedents, the Court of Appeals reasoned that

> *Per se* rules of illegality are appropriate only when they relate to conduct that is 'manifestly anticompetitive.' *The record shows no basis for finding that Mack's sales assistance program constitutes price-fixing or that this program creates a 'pernicious effect on competition.'*

715 F.2d at 847, citing *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (emphasis supplied). Thus, the predicate for application of the *per se* rule was absent in this case, and the Court of Appeals' holding was squarely consistent with all recent Supreme Court decisions concerning the application of the rule of reason.

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), which petitioner contends is in conflict with the Court of Appeals' application of the rule of reason, actually firmly supports the Court of Appeals' holding. In *Maricopa County*, this Court explained that the *per se* rule applies when a price fixing agreement is found, or when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." 457 U.S. at 344.

By applying the rule of reason only after making the determination that neither of these bases for application of the *per se* rule was present, the Court of Appeals correctly followed *Maricopa County*, as well as the precedent on which *Maricopa County* is founded.

2. The Eighth Circuit Properly Reversed The Trial Court's Judgment, Rather Than Remanding For A New Trial

The Court of Appeals' reversal of the trial court's judgment without remand was proper. First, by failing to present any evidence at trial concerning the alleged anticompetitive effect of the practices in which respondent engaged, petitioner failed to satisfy its burden of proving this element of its rule of reason case. *See Cowley* v. *Braden Industries, Inc.*, 613 F.2d 751, 754-55 (9th Cir.) (holding that the plaintiff's failure to meet its burden of proving an anticompetitive market effect because of its adherence to an incorrect theory of law at trial required entry of judgment for the defendant), *cert. denied*, 446 U.S. 965 (1980); *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184, 1193-1194 (3d Cir. 1976) (affirming a grant of summary judgment because of a lack of evidence to establish a rule of reason violation where the plaintiff only marshalled arguments relevant to the *per se* test) *cert. denied*, 433 U.S. 908 (1977); *Medical Arts Pharmacy* v. *Blue Cross & Blue Shield, Inc.*, 518 F. Supp. 1100, 1109 (D. Conn. 1981), (finding insufficient evidence to establish rule of reason claim where the plaintiffs "placed all their eggs in the *per se* basket," thereby resulting in a failure of proof) *aff'd*, 675 F.2d 502 (2d Cir. 1982).

Second, petitioner never argued before the Court of Appeals, even in its petition for rehearing, that rejection of its *per se* theory required a remand for trial under the rule of reason and cannot be permitted to raise that contention for the first time in this Court. *See*, e.g., *Lawn* v. *United States*, 355 U.S. 339, 362, n.16 (1958).

Third, even if petitioner had not waived its argument that this case should have been remanded for trial under the rule of reason, the Court of Appeals did not err by entering judgment for Mack, because the Court found on the basis of the record evidence that the jury could not have been permitted to find a rule of reason violation. The Eighth Circuit found that the evidence could lead only to conclusion that the sales assistance program promoted rather than hindered competition, precluding a judgment against Mack under a rule of reason theory. The Court of Appeals stated that

> the evidence points without contradiction to the conclusion that the purpose of Mack's discount program is not to force adherence to any particular price scheme of Mack's, but to promote sales of Mack trucks, particularly where the potential sale is one of a large volume. * * * After examining the entire record, we fail to see how Mack's program can be characterized as anything other than procompetitive. If Lewis' representations in its request for sales assistance are true, Lewis presumably would not be able to offer a competitive price without sales assistance. The ultimate customer would therefore probably pay a higher price, and Lewis would make no sale or profit at all. Thus, the effect of the discount program, as in *AAA Liquors*, is to lower retail prices to customers and increase interbrand competition. Lewis offers no evidence to the contrary.

714 F.2d at 847-48. Thus, the Court of Appeals' holding that the rule of reason applied and was satisfied is not appropriate for review by this Court.

II

CONCLUSION

The Court of Appeals' decision relied heavily upon its analysis of the specific facts of this case. That careful

analysis does not merit review by this Court. Moreover, the Eighth Circuit recognized that outlawing Mack's sales assistance program would represent an unprecedented departure from all applicable interpretations of the Sherman Act and could only result in a lessening of competition in those markets in which price allowance programs are utilized. Because petitioner remains unable to demonstrate any anticompetitive effect of Mack's procompetitive program, or to demonstrate any conflict between the Eighth Circuit's decision and any other precedent, the petition should be denied.

Date: March 2, 1984

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